

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
v.)	Case No. 0909010151
)	Case No. 0902010157
)	Case No. 0906007625
PETER KOSTYSHYN,)	
PATRICIA KOSTYSHYN,)	
)	
Defendants.)	

Submitted: February 15, 2010
Decided: February 15, 2010

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ORDER

This matter was scheduled for trial on February 15, 2010. Prior to jury selection, counsel for defendant Peter Kostyshyn, presented a verbal motion requesting permission to withdraw as Counsel in the above-captioned matters.

Defendant Peter Kostyshyn was present and actively participated in oral argument of the instant motion.

Also, counsel for co-defendant Patricia Kostyshyn, moved for a separate trial on the criminal charges pending against her. Following oral argument, based upon the record and for the reasons stated in this Order, the Court GRANTED the Motion to Withdraw. The Court also GRANTED counsel's motion for separate trial.

THE FACTS

Peter Kostyshyn (hereinafter "Peter") is presently charged with two (2) separate sets of criminal offenses arising from two (2) different alleged criminal incidents. Peter and his sister Patricia Kostyshyn (hereinafter "Patricia") were taken into custody in connection with the first of these incidents on February 12, 2009. Peter was arrested on charges of Assault Second, Criminal Mischief less than \$1,000.00, Malicious Interference with Emergency Communication, Menacing, Disorderly Conduct and three (3) counts of Offensive Touching (Case No. 0902010151).¹ Patricia was arrested on charges of Menacing and Disorderly Conduct (Case No. 0902010157).

Assistant Public Defender David Lukoff (hereinafter "Lukoff") was appointed to represent Patricia, who met the qualifications for public representation, as did Peter. The Office of the Public Defender declared that it could not simultaneously represent Patricia and Peter with regard to the charges against them as this would

¹ Peter's Assault Second charge was subsequently downgraded to a charge of Assault Third.

create an impermissible conflict-of-interest. As such, on April 1, 2009, Timothy Terranova (“Terranova”) was appointed as conflict counsel to defend Peter in connection with the charges. Subsequently, on June 5, 2009, Peter was once again arrested on a separate incident and charged with a single count of Disorderly Conduct.

Following a hearing on June 12, 2009, the Court granted the State’s motion to consolidate Peter and Patricia’s matters for trial which arose out of the February 12 incident. At that same hearing, Terranova presented a Motion to Withdraw as Counsel for Peter, indicating communications between himself and Peter had “eroded significantly since [their] initial meeting.” Terranova asserted that his client had “differing ideas regarding what information [was] relevant and/or pertinent” and that on a prior occasion, he had been unsuccessful in having Peter fill out an Arraignment 10-C form and signing the bond papers with notice to appear. The Court, having heard and considered the motion granted Terranova leave to withdraw as counsel.

On August 26, 2009, Jonathan Layton (hereinafter “Layton”) was appointed to represent Peter. In a September 10, 2009 letter to the Court, Layton indicated that he had been in contact with Patricia Schwartz at the Office of Disciplinary Counsel, who advised him that his representation of Peter raised issues of client confidentiality pursuant to *Delaware Professional Rules of Conduct* 1.9(c)(1). Based on his representation, the Court granted Layton leave to withdraw as counsel for Peter.

Thereafter, Patrick Collins (hereinafter “Collins”) was appointed counsel for Peter, for charges in the Court of Common Pleas and the Superior Court. On December 7, 2009, Collin’s filed a Motion to Withdraw from representation of Peter, indicating that their attorney-client relationship had deteriorated beyond repair. Collins’ indicated that Peter had become “agitated” during his first case review in Superior Court on November 9, 2009. Collins alleged that despite his assurances to Peter that any continuance requests that arose would be handled, Peter refused to sign his notice to appear for his final case review which coincided with his trial in the Court of Common Pleas.

Following the denial of Peter’s request to address the court by the Honorable John E. Babiarz Jr., Peter inquired about removing Collins, as counsel. Judge Babiarz advised Peter to contact the criminal assignment judge. Following this discussion, Collins stated in the motion that he continued his representation when Peter took no further action. Collins’ motion also stated that on December 1, 2009 at a hearing held to consider modification of bail conditions, Peter “again became upset”, asked to address the court and was denied by the Honorable Commissioner Michael P. Reynolds. Peter then asked the court for permission to leave, which was granted. On the way out, Peter is alleged to have yelled in counsel’s direction, “Mr. Collins, you’re fired. You’re an idiot.” That same day Collins stated he received a voicemail message from Peter which was thirty (30) minutes in length instructing Collins to withdraw from representation. Collins indicated that Peter’s message was derogatory in nature, alleged Collins was in collusion with the prosecutor, and threatened to sue

him for malpractice. On January, 19 2010, the Court granted Collins' motion to withdraw as counsel.

On January 28, 2010, Peter Letang (hereinafter "Letang") was appointed to represent Peter on the pending matters in both the Court of Common Pleas and the Superior Court.. On the morning of trial, February 15, 2010, Letang presented a verbal motion to withdraw as counsel. Letang stated Peter insisted on presenting opening statements to the jury and introduce numerous irrelevant "materials" which he brought with him. Letang told the Court that he had previously discussed introducing the many "bags" of materials with Peter during the course of his representation and had expressed belief that the materials were not relevant. Letang informed the Court that he had strongly advised Peter against presenting such materials and personally making opening statements to the jury because he felt that it may alienate or leave a bad impression on the jury. Letang indicated he no longer felt comfortable representing Peter going forward but was willing to assist him at trial in an advisory capacity.

During a lengthy and protracted discussion in this matter, Peter accused Letang of being lax in his preparation for trial, and accused the Court of conducting numerous pre-trial conferences in his absence. Peter also indicated that he had made numerous unsuccessful requests to review the case file, and Letang and his predecessors had not been diligent in their representation, citing their failure to procure adequate discovery.

The Court made it clear that if Peter intended to retain Letang's services at trial, he could consult with counsel, but would ultimately have to defer to counsel on matters such as case strategy, presenting the opening statements and questioning witnesses. The Court also indicated that if Peter no longer wanted Letang to represent him, he was entitled to represent himself at trial. The Court clarified that the only off-the-record discussion it had with Letang was to ensure that Letang would be available on the date of trial after the Court was made aware of certain health issues. The Court firmly indicated during this conversation there had been absolutely no discussion with regards to the merits of the case, or what the Court would do following a jury verdict. Peter continued to allege Letang had not been diligent in his representation and was guilty of "mismanagement of justice."

As a result of this development, Lukoff, on behalf of Patricia, moved to sever her trial on the basis there is potential prejudice that could result from co-defendant Peter's behavior. The State objected to the severance, arguing that the charges against both defendants arose out of the same incident and involved the same victims. The State also referred to the fact that the Court had previously granted the State's Motion to have the matters tried together. Having considered oral arguments, the Court denied counsel's request to sever the litigation. Additionally, the Court denied Letang's request to withdraw as counsel for Peter noting that the motion was made at the eleventh hour.

After a brief recess, the Court reconvened to proceed with jury selection. Letang reported that Peter continued to be abusive and once again presented a verbal

motion seeking to withdraw from his representation of Peter. Letang indicated that during the recess, Peter had threatened to file complaints against Letang with the Office of Disciplinary Counsel if Letang failed to follow Peter's instructions regarding jury selection. Based on these representations and Peter's earlier behavior, Letang indicated the attorney-client relationship had disintegrated irreparably and requested an order allowing him to withdraw as counsel for Peter. This motion was granted. Because Peter would proceed pro se, the Court concluded it was in the best interest of justice to sever the matters, thus it granted Patricia's motion for a separate trial.

THE LAW

The Sixth Amendment to the United States Constitution states that "in all criminal prosecutions, the accused shall enjoy a right ... to have the Assistance of Counsel for his defense."² Pursuant to 29 *Del. C.* § 4602(a), a Public Defender must "represent, without charge, each indigent person who is under arrest or charged with a crime."³

However, the Delaware Supreme Court has held that a defendant may forfeit his Sixth Amendment right to counsel when he engages in "extremely serious misconduct" such as "being verbally abusive, threatening harm to the attorney, or threatening to sue the attorney."⁴ Forfeiture may occur if a client's conduct is "sufficiently egregious" and does not require the Court to warn the defendant about

² *U.S. Const. amend. VI*; see also *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³ 29 *Del. C.* § 4602(a).

⁴ *Bultron v. State of Delaware*, 897 A.2d 758, 764 (Del.Sup.,2006) (citing *McLeod*, 53 F.3d 322, 325 (11th Cir.1995)).

the consequences of “ ‘engaging in misconduct’ ” or the “ ‘risks of proceeding pro se.’ ”⁵

Finally, whether to grant or deny severance is a matter within the sound discretion of the trial court.⁶

DECISION AND ORDER

The critical issue in this matter was whether Peter has forfeited his right to appointed counsel, and either must proceed *pro se*, or hire private counsel for purposes of representation for the charges pending against him. The undisputed facts on the record show repeated occurrences of abusive behavior on the part of the defendant towards members of the Public Defender's Office and the legal community. Peter indicated, on numerous occasions, in no uncertain terms, his dissatisfaction with court appointed counsel, the prosecutor, and the Court. Peter made repeated references to his attorney being incompetent and unprepared, and threatened disciplinary action against him. Although counsel made several attempts to resolve Peter's complaints and proceed to trial, Peter continually insisted that he is dissatisfied with the services being provided to him. During the colloquy, Peter indicated to the Court that he did not believe that Letang had been sufficiently diligent in his preparation for trial, that he had not allowed him access to his case file, and made no indication that he would make any future attempts to resolve his differences with Letang.

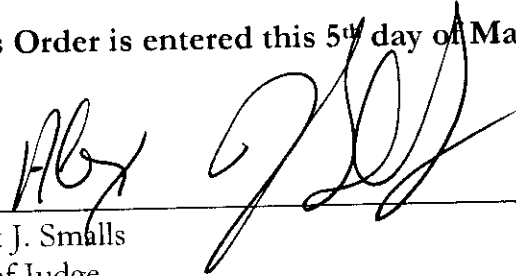
⁵ Bultron, 897 A.2d at 765 (quoting United States v. Goldberg, 67 F.3d 1092 at 1101 (3d Cir.1995)).

⁶ Bates v. State, 386 A.2d 1139 (Del.1978).

The Court is of the opinion that Peter's repeated and consistent behavior is sufficiently egregious to cause him to forfeit his entitlement to representation by conflict counsel at the public's expense. Therefore, Letang's motion to withdraw was granted. Accordingly, Peter must obtain counsel at his own expense or proceed pro se at all future proceedings.

The Court also finds that joinder of the defendants Peter and Patricia in the same trial in the above-captioned matters could reasonably result in prejudice to co-defendant Patricia. The Court order joining the two cases for trial is vacated and Patricia's motion to sever the above-captioned matters is granted.

This Order is entered this 5th day of March, 2010



Alex J. Smalls
Chief Judge